***United States Court of Appeals***

***for the Second Circuit***

# PETITION FOR REHEARING

# 75-7165
# 75-7166

## United States Court of Appeals
FOR THE SECOND CIRCUIT

INTERNATIONAL RAILWAYS OF CENTRAL AMERICA,
*Plaintiff-Appellant,*

*against*

UNITED BRANDS COMPANY,
*Defendant-Appellee.*

INTERNATIONAL RAILWAYS OF CENTRAL AMERICA,
*Plaintiff-Appellant,*

*against*

COMPANIA AGRICOLA DE GUATEMALA,
*Defendant-Appellee.*



APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

## PETITION FOR REHEARING

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## TABLE OF CONTENTS



## TABLE OF CASES



Notes on References:

PMB is plaintiff-appellant's main brief. PRB is plaintiff-appellant's reply brief.

## PETITION FOR REHEARING EN BANC

This petition for rehearing, with suggestion that it be en banc, is submitted, pursuant to Rules 35 and 40, Federal Rules of Appellate Procedure, on behalf of plaintiff-appellant International Railways of Central America (hereinafter "IRCA"), with respect to the Panel's decision dated March 4, 1976 (Sl. Op. 2303 et esq.).

## REASONS FOR GRANTING REHEARING

The Panel erred on major points of law and has created an erroneous and dangerous precedent which cripples enforcement of the antitrust laws:

1. The Panel's point of departure, to wit, its concept of the relevant market, was erroneous; it stated (fn. 18) "bananas imported from Central and South America and the Caribbean constitute the relevant market since they compete in the United States market with Guatemalan bananas."* Mandeville Farms v. Sugar Co., 334 U.S. 219 demonstrates the Panel's error. There the Supreme Court sustained a complaint alleging violation of

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* The Court continued (fn. 18): "Moreover, appellee continues, there was no proof whatsoever of monopoly power, i.e., the ability to fix prices or exclude competition in that market. Rather than remand for further proof we will assume the relevant market determined by the court below."

§§1 and 2 of the Sherman Act based on a conspiracy of California sugar refiners to fix the prices they would pay for sugar beets grown in California. The Court held that an agreement to "control a local market in which they purchase is condemned" (237); that it is immaterial that the restraints precede the interstate marketing of the sugar and immediately affect only the local marketing of the beets. The Court held, further, as follows (at 236):

> "Nor is the amount of the nation's sugar industry which the California refiners control relevant, so long as control is exercised effectively in the area concerned."

Thus the fact that California sugar competes with sugar from other areas in the United States or other nations, is not relevant "so long as control is exercised effectively in the area [California] concerned." Likewise here, it is irrelevant that Guatemalan bananas compete in the United States market with bananas from Central and South America and the Caribbean, "so long as control is exercised effectively in the area [Guatemala] concerned."

In Gamco, Inc. v. Providence Fruit & Produce Bldg., 194 F2d 484 (1st Cir., per Clark, J. of this Court sitting by designation) a single building was the relevant market.

Therefore, the Panel erroneously believed that competitive forces should be measured in the entire United States instead of at one source of supply, namely, western Guatemala. Apparently this learned Panel failed to appreciate

that a source of supply can be a relevant market. The Panel failed to recognize "that 'relevant market' is simply a shorthand phrase used to describe 'the area within which the strengths of competitive forces is measured.' ... It does not necessarily mean the selling place." (Woods Exploration & Pro. Co. v. Aluminum Co. of America, 438 F2d 1286 (5th Cir.), see PMB 134-138, 49-59, PRB 4-8). The relevant market here was growing and shipping bananas from western Guatemala by rail via IRCA to the port of Barrios for shipment by water to the United States. Therefore, even though the Court stated that it adopted the relevant market of the District Court which assumed that bananas imported solely from Guatemala was the relevant market, the Panel's failure to, in fact, believe its premise precluded it from focusing on the true issue, infra, pp. 10-12.

2. The learned Panel erred in holding (Sl. Op. 2314): "that plaintiff must establish that the defendant had a deliberate or willful purpose to exercise monopoly power" (emphasis supplied).

The Supreme Court, in U.S. v. Trenton Potteries, 273 U.S. 392 (1927), held that even a criminal price fixing case does not require proof of an intention to violate the law.

Here, plaintiff contends that United's attempt to fix a monopolistic, low price* that it would pay IRCA for

* Ripley held that $130 was a fair price and that a $90 rate was an unfair rate that was fixed under United's control and domination, pursuant to its breach of fiduciary duty owed to IRCA. Below, both parties contended that $130 was the fair rate for the line haul.

railroad services under a threat of abandonment of its Tiquisate operation, was an abuse of monopoly power. Once plaintiff established that United monopolized western Guatemala (as shown, infra,pp.6-9), the Court should find that plaintiff proved the abuse of monopoly power since the District Court found that United made threats to IRCA, to wit, "Before and after February 16, 1961 United officials informed IRCA that unless the Ripley judgment required rate of $130 per banana carload was reduced to $90, the Tiquisate operations might have to be liquidated. IRCA refused to reduce the $130 Ripley-decreed rate" (I 325A, 177-178) and "IRCA's refusal to lower the rate was in the face of clear intimations by UF, as plaintiff has shown, that, as an alternative, the defendants might have to discontinue the Tiquisate operation" (I 217A).

Thus, plaintiff proved, based on the District Court's findings, that United the monopolist, abused its monopoly power and attempted to price fix what it would pay IRCA. Thus the District Court found that United made it clear to IRCA that unless IRCA reduced its rate from $130 to $90, United would abandon Tiquisate; when IRCA refused, United carried out its threat. That is the classic proof in price fixing cases (here at the supplier level instead of at the customer level).

In La Chapelle v. United Shoe Machinery Corp., 90 F.Supp. 721 (D. Mass.), the Court denied a motion to dismiss

the complaint under §4 of the Clayton Act and stated (723):

> "But the injury is equally great to one who wishes to sell his product in a market subject to monopolistic control and must sell to the monopolist as the only available buyer, again on the monopolist's terms, or not at all. Here the injury is the direct result of the monopolistic condition which has been created, and the injured seller may recover under §15".

Here IRCA is the injured seller, it could only sell to monopolist United on its terms, or not at all.

The Panel erroneously found (Sl. Op. 2315) that because the plaintiff did not reduce the price, then that proves IRCA's "strength and independence", which is not only in square conflict with Warner & Co. v. Black & Decker Mfg. Co., 277 F2d 787 (2nd Cir.), but is irrelevant. In effect, the Panel announces, contrary to established law, that only successful price fixing is a violation of the law and that threats, carried out by a monopolist to punish a supplier or a customer of a monopolist where the victim refused to cave in to the demand for a monopolistic price, is not actionable.

In Warner & Co., supra, a distributor refused defendant supplier's threats to price fix in accordance with defendant's prices; defendant carried out its threat and terminated plaintiff's distributorship. This Court held those facts stated a cause of action and reversed the dismissal of the complaint (the fact that that was a conspiracy case is irrelevant since all price fixing under §§1 and 2 are per se*

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* In U.S. v. Aluminum Co. of America, 148 F2d 416, 428 (2nd Cir.), Judge Hand stated "all contracts fixing prices are unconditionally prohibited ..."; he stated that there is little real difference between such contracts and a monopoly.

violations of the law since Trenton Potteries, supra, in 1927.

The Supreme Court cases, including United States v. Grinnell Corp., 384 U.S. 563, do not require proof of a specific intent or "deliberate purpose" to exercise monopoly power in connection with the claimed abuse. In United States v. Griffith Amusement Co., 334 U.S. 100, at 108, the Supreme Court held:

> "When the buying power of the entire circuit is used to negotiate films for his competitive as well as his closed towns, he is using monopoly power to expand his empire. And even if we assume that a specific intent to accomplish that result is absent, he is chargeable in legal contemplation with that purpose since the end result is the necessary and direct consequence of what he did" (emphasis supplied).

Likewise here, United is chargeable with the purpose of exercising its monopoly power "since the end result is the necessary and direct consequence of what [it] did." The learned Panel committed error in holding that under Grinnell, supra, plaintiff had to establish that defendant had a "deliberate or willful purpose [specific intent] to exercise monopoly power" (Sl. Op. 2314).

3. The learned Panel erred in the proof required under Grinnell, supra. Grinnell, at 570-1, held that to prove monopolization, plaintiff must show:

> "(1) the possession of monopoly power in the relevant market and
>
> (2) the willful acquisition or maintenance of that power as distinquished from growth or development as a consequence of a superior product, business acumen or historic accident."

Per Grinnell, at 576 n.7, the second element of the offense, "the willful acquisition or maintenance of that [monopoly] power," is established by proof of "unlawful and exclusionary practices" by which "monopoly power was consciously acquired". Here such "unlawful and exclusionary" practices by United were established to the hilt.* This Court on the first appeal in this case (Friendly, J., I-7A), held that United acquired stock control in 1930.

> "for the double purpose of insuring continuation of the favorable freight rates and service on its own products and of preventing similarly favorable rates to competitors."

It further held (id.):

> "On banana shipments from western Guatemala, UF for many years paid only $60 per car, performing the wharfage service and loading at Barrios with its own labor, whereas independents paid $130 per car for the line haul and about $72 for wharfage and loading, on which IRCA made a profit ... On imports through Barrios to western Guatemala IRCA charged the public $350 or more per carload as against $60, later $100, to UF. In numerous instances IRCA, at UF's instance, denied to independents services comparable to those furnished its controlling stockholder."

Regarding equipment, the District Court found another exclusionary practice: "There is no doubt that CAG was given preferential treatment over Standard in the transportation of bananas from the West Coast" (I 212A). Thus plaintiff's proof on the second element of monopolization in Grinnell is based

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* The Panel appeared to hold that UF "had clearly been guilty of predatory conduct in the past" (Sl. Op. 2319).

on unchallenged facts and the findings below.

This Court in U.S. v. Aluminum Co. of America, 148 F2d 416, 432 (C.A.2), stated in full context:

> "In order to fall within §2, the monopolist must have both the power to monopolize, and the intent to monopolize. To read the passage as demanding any 'specific' intent, makes nonsense of it, for no monopolist monopolizes unconscious of what he is doing." (emphasis supplied)

Accordingly, the District Court also erred as a matter of law in holding that the plaintiff had to prove United had a specific "intent" (I 222A) to violate the antitrust laws.

Regarding the first element in Grinnell, "possession of monopoly power in the relevant market", the defendants conceded (Def.'s Br. p.63) that "the Courts have inferred monopoly power" where the share of the relevant market was in"the range of 70%* - 100%." The undisputed evidence is that for the period 1954 through 1961, United had over 72% of banana shipments from western Guatemala via IRCA to Barrios for shipment to the United States and practically 100% of the shipments for the period 1962 through 1964 (PRB 6). Since it was undisputed that United exported to ports in the United States substantially all of the bananas carried over IRCA from eastern Guatemala (PMB 53, App. C), United's monopoly over banana shipments from eastern and western Guatemala via IRCA to Barrios for shipment to the United States was 75% for the period 1954 through 1961 and practically

* United States v. Paramount Pictures, Inc., 334 U.S. 131, 167.

100% for the period 1962 through 1969 (PRB 6-7). Thus plaintiff proved, on uncontested findings and unchallenged facts, United's monopolization of western Guatemala and all of Guatemala, a clear violation of Section 2 of the Sherman Act.

4. The Panel erred in holding that the "appellant here however has failed to establish the deliberate and intentional combination to refuse to deal" (Sl. Op. 2318, emphasis supplied). This Court in Aluminum Co. of America (per L. Hand, J.) supra, (427) stated: "... all contracts [and conspiracies] fixing prices are unconditionally prohibited ..."

The Panel's requirement that plaintiff show a "deliberate and intentional combination" is just not the law. In American Tobacco Co. v. U.S., 328 U.S. 781, the Supreme Court stated that (809-10) "the essential combination or conspiracy ... may be found in a course of dealings or other circumstances, as well as in any exchange of words" and may even be "wholly innocent acts".

In Paramount Pictures, supra, the Supreme Court stated:

> "mutual consent need not be bottomed on express agreement, for any conformance to an agreed or contemplated pattern of conduct will warrant an inference of conspiracy ...; an exchange of words is not required; not only action, but even a lack of action, may be enough from which to infer a combination or conspiracy."

Moreover, subsidiary corporations and individual officers and directors may be parties to such a combination (U.S. v. Columbia Steel Co., 334 U.S. 495, 522; U.S. v. Yellow Cab

Co., 332 U.S. 218, 227).

United-CAG constituted the combination or conspiracy here. The proof was so overwhelming, defendants did not contest the point in the District Court (PRB49-50). The law, we submit, clearly supports plaintiff that United and CAG were capable of combining and conspiring with each other in conduct which violates the antitrust laws and in fact, did so (PMB 139-40, PRB 49-52).

5. Moreover, even if there was no unlawful fixing of price, the Court completely overlooked plaintiff's undisputed proof that United abandoned Tiquisate to maintain its monopoly in Guatemala or Central America. The Court, due to its error in judging the relevant market as the United States instead of Guatemala, failed to grasp plaintiff's position that Central America* is, also, a relevant market. The law is established that where a monopolist takes action which has the effect of maintaining its monopoly, that is a violation of Section 2 of the Sherman Act. That principle of law is applicable to the facts here. The District Court found that the phaseout of Tiquisate was part

* Plaintiff clearly proved (PMB 54-6) that United had monopoly power in Central America, to wit, over 70% of that source of supply, in the period 1954 to 1963, predating and at the time of the adoption of the 1963 plan, and over 70% of the Central America source of supply, in the post-1963 plan stage, to wit, 76% in 1965, 76% in 1966 and 75% in 1967, showing United, in fact, enhanced its monopoly power. United's general intent to maintain its monopoly in Central America is, shown by the same evidence that demonstrated United's intent to acquire or maintain its monopoly in Guatemala (supra, p. 7).

of United's plan to shift its entire planting program to the Valery,with only Central America as a source of supply (I 302A, 139, PMB 123-6, 54-9, 53-4). Plaintiff did not have to show that defendant United intended to maintain its monopoly in Central America; the Supreme Court has consistently held that it is sufficient to show that the result demonstrates the purpose to maintain a monopoly, unlawfully obtained (PMB 127). In fact, here,United enhanced its monopoly in Central America. Even if intent is needed, Judge Learned Hand's classic statement in Aluminum Co. of America, supra, is applicable here, to wit, "no monopolist monopolizes unconscious of what he is doing." United, in abandoning Tiquisate, did so with a significant motive, viz. to maintain its monopoly in Central America: in abandoning Tiquisate as it did, United effectively foreclosed Tiquisate to its potential competitors. IRCA was clearly injured by United's terminating its shipments from western Guatemala.

By closing Tiquisate in the way it did, namely tearing up the rails and removing the irrigation equipment (PMB 38-39), United closed down Tiquisate with the distinct purpose of preventing competitors from producing there; thus making certain that up to 9,000,000 stems of competitive fruit annually were not shipped from western Guatemala via IRCA to Barrios for export to the United States (PMB 57, 23-24, 28-29). Thus, 9,000,000 competitive stems from Tiquisate would have given the independents a 100% increase in their Central America supply over 1963 and would have increased the total United States supply from Central America

by over 30% (PMB, App. E); the price in the United States would have dropped and United's Central America monopoly would have been shattered and United's five year plan subverted (PMB 56-7). Therefore, United's closing of Tiquisate was clearly in maintenance of its Guatemalan monopoly, which continued to the extent of 100% in eastern Guatemala, and also in maintenance of its monopoly in Central America.

6. Plaintiff having established violations of §§1 and 2 of the Sherman Act, the Panel erred in excusing those price fixing violations under §§1 and 2 and United's monopolization under §2 of the Sherman Act on the ground that the dominating motive in United's abandonment of Tiquisate was legitimate business reasons. The Panel erred in accepting a legitimate business motive when the District Court's findings of fact demonstrates that the abandonment of Tiquisate was also carried out in connection with United's violation of the antitrust law, to wit, attempt to fix prices. While the Panel recognized that certain per se antitrust violations cannot be excused by "decent or morally justifiable" motivation of the defendant (Sl. Op. 2317), it overlooked the full thrust of the rule that even "a legitimate business motive" in abandoning Tiquisate does not excuse antitrust violations, including price fixing and a monopolist's acts in maintaining its monopoly in Guatemala or Central America.

In Fashion Guild v. Trade Comm'n, supra, at 468,

the Supreme Court affirmed the holding that defendants' violations of §§1 and 2 could not be excused as a matter of law and stated:

> "Under these circumstances it was not error to refuse to hear the evidence offered, for the reasonableness of the methods pursued by the combination to accomplish its unlawful object is no more material than would be the reasonableness of the prices fixed by unlawful combination."

Accord: Aluminum Co. of America, supra, Trenton Potteries, supra, Klor's v. Broadway-Hale Stores, 359 U.S. 207 (PMB 114, 116-7, 120-1, 123, 129-30: PRB 1-2).

Arguendo, United's alleged legitimate business motive was merely a "method" pursued in closing Tiquisate but that closing carried out United's "unlawful object" in that it enforced United's attempt to monopolistically price fix and advanced United's monopoly in Guatemala and Central America.

7. The Panel has not stated correctly plaintiff's position. The Panel stated (Sl. Op. 2318-9):

> "Appellant has not cited nor have we found any case that has held or even suggested that companies which abandon a business are guilty of Sherman Act violations simply because as a result of their decision a vendor or supplier or customer will lose trade."

First, we are not dealing with an abandonment of a business, we are talking about abandonment of a division of a business; second, we are not talking about just any company, we are here dealing with a monopolist which used IRCA over the years

as its instrument in building its monopoly position by predatory practices in restricting, suppressing and foreclosing competition; third, that monopoly is being charged with specific violations of the antitrust laws in terminating its operations at Tiquisate; and fourth, our situation is not simply one where as a result of a company closing down, a "vendor or supplier or customer will lose trade"; on the contrary, monopolist United told IRCA directly, 'either you lower your rate or we abandon Tiquisate'. Thus, here, IRCA lost business because it did not accept the monopolistically low price which United was requiring it to accept - and United, the monopolist, completed its threat by shutting down.

Had IRCA accepted the monopolistically low price, it would have lost so much money that it would have gone out of business. United did not give IRCA true economic alternatives: If IRCA accepted United's price, it would have lost money and folded; by not accepting United's price, it was eventually doomed because United was IRCA's biggest customer. United had restricted, stifled and precluded competition in Guatemala and had thereby placed IRCA at its mercy.

United's control over the Guatmalan market was like the control exercised by the sugar refiners in Mandeville, supra, where the Supreme Court stated (240):

> "Even without the uniform price provision and with full competition among the three refiners, their position is a dominating one. The growers' only competitive outlet is the one which exists when the refiners compete among themselves. There is no other market. The farmers' only alternative to dealing with one of the three refiners is to stop growing beets. They can neither plant nor sell except at the refiners' pleasure and on their terms. The refiners thus effectively control the quantity of beets grown, harvested and marketed, and consequently of sugar sold from the area in interstate commerce, even when they compete with each other. They dominate the entire industry. And their dominant position, together with the obstacles created by the necessity for large capital investment and the time required to make it productive, makes outlet through new competition practically impossible. Upon the allegations, it is absolutely so for any single growing season. A tighter or more all-inclusive monopolistic position hardly can be conceived."

## CONCLUSION

The petition for rehearing en banc should be granted and upon rehearing the decision of the District Court should be reversed and the matter remanded for a trial on damages.

Respectfully submitted,

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Note: By not mentioning other points, plaintiff does not waive them.